IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11297 of 1993
to
SPECIAL CIVIL APPLICATIONNo 11306 of 1993

HON'BLE MR.JUSTICE K.S.JHAVERI

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KANDLA PORT TRUST
Versus
PUSHPA BHAIRYANI

Appearance:
MR AK CLERK for Petitioner No. 1
MR CH VORA & MR HJ NANAVATI for Respondent No. 1
MR HS MUNSHAW for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI
Date of decision: 17/08/2004

ORAL JUDGEMENT

1.0 A common question of law is raised in all the above petitions and therefore they are considered together. In the above petitions the petitioner Kandla Port Trust has challenged the legality and validity of the common judgement and order of the Tribunal dated 30th

August 1993 in so far as it directed the petitioner Trust to treat the respondents-employees as regular teachers from the date of initial appointment and further directing the petitioner Trust to fix their salary by giving notional increments and to pay consequential benefits flowing therefrom from 22.5.1986 (i.e. the date of constitution of the Tribunal).

2.0 The respondents-teachers (hereinafter referred to as the Teachers) were originally appointed as ad-hoc teachers by the petitioner Port Trust and their services were regularised on the basis of a settlement with effect from 10th September 1980. The Teachers therefore approached Gujarat Primary Education Tribunal by filing Applications No.122 to 130 and 158 of 1991 and claimed that they should be treated as regular employees from the date of their appointment on adhoc basis and should be given the benefits such as pay-scales, seniority, etc.

3.0 The petitioner Port Trust appeared before the Tribunal and raised the following contentions:

[a] That the Teachers had accepted their adhoc appointment with full knowledge that they shall not be able to claim regular appointment on the strength of their adhoc appointment and they had accepted that position with open eyes. Therefore, they are estopped from claiming regular appointment, seniority and other benefits from the date of their initial appointment on adhoc basis.

[b] The Hon'ble Supreme Court has held in the cases of Masood Aktarkhan & Ors. Vs. State of M.P. & Ors., reported in 1990(4) SCC 24, D.N. Agarwal & Anr Vs. State of M.P. & Ors., reported in 1990(2) SCC 553, and V. Rameshwari Vs. Union of India & Ors., reported in 1993(I) CLR 308 (SC) and NN Patel Vs. STate of Gujarat, reported in 1993(1) GLH (UJ)5 that employees cannot claim seniority and other benefits and the benefit of service prior to their date of regularisation and that they will be entitled to get seniority only from their regularisation.

[c] That five of the Teachers were regularised in 1983 on the basis of understanding/settlement arrived at with the then recognised union. The Teachers have also admitted in their deposition that they were regularised under pressure from the Union. It is therefore clear that the

Teachers had given up their claim for being regularised from any earlier date and had accepted their date of regularisation as per the understanding reached with the Union and they had their date of regularisation.

[d] That by the fact that though they were regularised in 1983 or earlier they have filed the applications only in the year 1991 i.e. after a period of 8 years. They have admittedly remained silent for these 8 years which goes to show that they had in fact given up their claim for regularisation from any earlier date.

[e] That the Teachers cannot be given seniority from the date prior to their date of regularisation inasmuch as it is an admitted position that they the opponents have made permanent appointment of teachers before the Teaches are given seniority from their initial date of adhoc appointment, they would steal march over the permanently appointed teachers and would become senior to them.

[i] That all the Teachers were appointed on adhoc basis and that they had accepted their adhoc appointments and therefore their seniority and service are reckoned from their date of regularisation.

[ii] That the Teachers have claimed in the applications that their seniority should be fixed from their initial appointment as adhoc teachers and that they should be given seniority from that date and that they should be given all backwages and that their

4.0 The Tribunal, after hearing the parties, partly allowed the applications and directed that the petitioner Trust should fix the pay of the Teachers after giving them notional increments from their initial date of appointment and to pay arrears of difference of salary with effect from 22.5.1986 and to continue to pay salary on that basis. However, the Tribunal held that the Teachers are not entitled to seniority for pension since there is no policy of Government. It is this decision which is questioned in the above petitions.

5.0 Mr. A.K. Clerk for the petitioner contended that since the Kandla Port Trust is established under the Major Port Trust Act, they are not governed under the

Bombay Primary Education Act. In my opinion, this contention of Mr. Clerk is misconceived. In view of the provisions of the Bombay Primary Education Act, 1947 the Trust could not have run the Primary Education School. Section 40A (1) states that on and after the commencement of the Bombay Primary Education (Gujarat Amendment) Act, 1986, no person other than the State Government, a School Board or an authorised municipality shall impart primary education through a school unless such school is recognised under the said section. Therefore, when the school is recognised under the said Act, the contention that the application by the Teachers before the Tribunal is not maintainable cannot be accepted.

5.1 Mr. Clerk contended that the respondents were appointed by the petitioner which is a Trust established under the Major Port Trust Act and therefore they will be governed by the provisions of that Act i.e. section 120 of the Act and no suit or other proceedings should be commenced without giving mandatory notice of one month as provided in section 120 of the said Act. The claim of the respondent is under the Major Port Trust Act. However, the claim is under Bombay Primary Education Act and the petitioner Trust is registered with authority under Bombay Primary Education Act and they are receiving regular grant from the State Government. Therefore the contention of Mr.Clerk is not tenable in law. I am, therefore, of the opinion that the respondent Teachers can approach the Tribunal under the Bombay Primary Education Act.

5.2 As per section 1(18A), "Private primary school" means a private primary school which is not maintained by the State Government or by a School Board or by an authorised municipality. Subsection (2) of Section 2 of the Act defines "Approved school" as a primary school maintained by the State Government or by a school board or by an authorised municipality and includes a private primary school recognsied under section 40A. Section 40A stipulates recognition of the school. Therefore it cannot be said that the government rules and regulations are not applicable to the school run by the petitioner.

5.3 Mr.Clerk contended that since the respondent Teachers were regularised pursuant to the settlement it will not be open to the respondeat Teachers claim more than what they have agreed in the settlement. It may be noted that no such settlement is placed on record before the Tribunal and therefore the said contention cannot be considered at this stage. Apart from that individual teacher can raise their grievance before the competent

authority or Tribunal or other appropriate Court for enforcement of their right. No settlement could take away the rights of teachers which they are otherwise entitled under the Bombay Primary Education Act.

5.4 Learned counsel for the petitioner has contended that the services of the Teachers were regularised pursuant to the settlement entered into by the petitioner with their Union and pursuant to the said settlement the Teachers had impliedly given up their claim for the period preceding the date of regularisation. He has drawn my attention to the evidence of the Deputy Secretary Shri Lalitkumar Gulabrai and submitted that the Teachers are restrained from claiming any additional benefit contrary to the settlement. The said contention is misconceived and individual rights for seniority or pay scale can be raised before the Tribunal.

6.0 With regard to the question of seniority, the Tribunal has not granted the same. Even otherwise, the Teachers have not joined the their seniors as party to the proceedings and in their absence no such contention could have been considered. The Tribunal has considered the submission and in my opinion, rightly rejected the said contention. The Teachers cannot steal march over the permanently appointed teachers which would create anomaly in the service cadre. Therefore, I agree with the findings of the Tribunal on the question of seniority. The respondent Teachers will not be considered seniors on the basis of the Tribunal's Judgement.

7.0 Mr Clerk for the petitioner has relied upon a decision of the Supreme Court in the case of Masood Akhtar Khan Vs. State of Madhya Pradesh, reported in (1990) 4 SCC 24 wherein it is held where appointees allowed to continue beyond the period of six months and later regularly selected by PSC,their seniority to be counted not from the date of their initial stop-gap appointment, but from the date of their regular selection under the rules.

7.1 Learned counsel for the petitioner relied upon a decision of this Court in the case of N.N. Patel and Ors. Vs. State of Gujarat, reported in 1993(1) GLH (U.J.)5 wherein it is held as under:

> "Though the appointment of the posts of clerks/typists in Secretariat is to be made through GPSC after passing GPSC Examination for the said post, the petitioners came to be

appointed purely temporary by extending benefits of Resolution at Annexure B exempting them from appearing in competitive test held by GPSC but subject to the approval of GPSC. It is an admitted fact that the services of the petitioners were regularised by the Government vide order dated 7.10.1976 and, therefore, the principles laid down by the Supreme Court in the case of Masood Akhtarkhan & Ors. 1990(4) SCC 24, are applicable on all fours and case of the petitioners is directly covered by the said decision and, in my view, therefore, the petitioners are not entitled to claim seniority from the date of their initial appointments but they are entitled to reckon their seniority from the date of regularisation of their service and that is what the respondents have done while publishing final seniority list."

7.2 Learned counsel for the petitioner relied upon a decision of the Supreme Court in the case of Masood Akhtar Khan and others Vs. State of Madhya Pradesh and others, reported in (199)4 SCC 24, wherein it is held that the seniority to be counted from the date of initial stop-gap appointment but from the date of regular selection under rules. This decision has been followed by this Court in the case of N.N. Patel (Supra).

7.3 In the above cases their initial appointment itself was not regular and therefore it was held that such service cannot be taken into consideration.

7.4 Learned counsel for the petitioner also relied upon a decision of the Supreme Court in the case of D.N. Agrawal and Anr. Vs. State of Madhya Pradesh, reported in (1990)2 SCC 553 wherein it is held that the ad hoc period of service cannot be counted for the purpose of their seniority in the cadre of Assistant Engineer. In that case the appellants therein were ineligible to be appointed as Assistant Engineers initially. Therefore, the said facts are entirely different from the facts of the present case.

7.5 Learned counsel for the petitioner relied upon a decision of the Supreme Court in the case of Kameshwari Vs. Union of India & Ors.reported in 1993 I CLR 308. In that case the appellant and the respondent no.3 were in the panel and respondent no.3 was treated senior and given appointment. The appellant challenged claiming seniority and it was held that the appellant is senior to respondent no.3 and directed that the appellant to be

promoted as Junior Clerk from the date on which respondent no.3 was promoted. In that case prior service of the respondent was not counted for the purpose of seniority. In the present case benefit of seniority was not given to the Teachers. Therefore, the aforesaid decision was not applicable to the facts of the present case.

8.0 As against the aforesaid decision, learned counsel for the respondent relied upon a decision of this Court in the case of Tribhovanbhai Jerambhai Vs. Dy.Executive Engineer, Sub-Division,R & B Deptt. and Anr. reported in 1998(2) GLH 1 wherein it is held that once a daily rated workman is treated to be permanent under the Resolution dated 17.10.1988 his entire continuous service from the date of entry until he retires including his services rendered prior to the date of his regularisation is taken into consideration for the purpose of computing pension or making pension available to such retired employee.

9.0 The Tribunal has granted only notional increment from the date of constitution of the Tribunal. Mr. Clerk then contended that even if the benefit is to be extended, then it cannot be granted from 22.5.1986 and at the most it should have been given from the date of application. Learned counsel for the respondents are unable to contest this submission on any ground. Looking to the facts and circumstances of the case, in my opinion, the Tribunal has committed an error in granting the benefits with effect from 22.5.1986 and it should have been from the date of application before the Tribunal.

10.0 In the premises aforesaid, the petition is partly allowed. The order of the Tribunal is modified to the extent that the petitioner shall fix the pay of the respondents Teachers after giving them notional increments from the date of their initial appointment, but payment of arrears will be paid only from the date of their respective application before the Tribunal and they shall also be paid all the consequential benefits of such arrears and other benefits flowing therefrom. However, it is clarified that the respondents Teachers are not entitled to seniority. Rule is made absolute to the aforesaid extent with no order as to costs.

[K.S. JHAVERI, J.]
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